



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

Case NO. 418/12

In the matter between:

SIPHO DLAMINI

Applicant

And

THE TEACHING SERVICE COMMISSION

1st Respondent

SWAZILAND GOVERNMENT

2nd Respondent

THE ATTORNEY-GENERAL

3rd Respondent

Neutral citation: *Sipho Dlamini v The Teaching Service Commission & Two Others (418/2012 [2013] SZIC 39 (December 6 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : **08 November 2013**

Judgment delivered: **06 December 2013**

Summary:

Applicant applied to this Court for an order reviewing and or setting aside the 1st Respondent's decision to suspend him without pay for a period of one year on the basis that it was fraught with irregularities. The 1st Respondent denied that there were any irregularities. Serious disputes of facts arising from the papers before the Court.

Held---Where disputes of fact arise in motion proceedings, the Court may make any competent order it deems fit including an order referring to oral evidence a specific dispute of fact or referring the matter to trial. Court orders that the matter is to be referred to trial.

**JUDGMENT
06.12.13**

[1] The Applicant in these proceedings is a teacher by profession. He is currently stationed at Mbabane Central High School. He is one of the two Deputy Head teachers employed at that school and was appointed to this position in 1991.

[2] Mbabane Central High School is a government maintained school. It has a staff compliment of about Forty one qualified teachers and about ten non-academic staff comprising of Groundsmen, Storemen, Bursar, Secretary, Cleaner and Cook. The school has two Deputy

- Headteachers who assist the Headteacher in the administration and management of the school.
- [3] The working relationship between the Headteacher and the two Deputy Head teachers is a very poor one and this has had an adverse effect on the general running of the school as a whole. The Ministry of Education tried to intervene in order to normalize the situation. At some point, the former Minister of Education took it upon himself to visit the school in an attempt to solve the problem.
- [4] The evidence before the court revealed that the two Deputy Head teachers once challenged the appointment of the incumbent Head teacher. The two Deputy Head teachers pointed out, *inter alia*, that the incumbent Head teacher was supposed to consult them and the school committee in the running of the school as he was relatively new at the school.
- [5] As a means to try and resolve the problem that was engulfing the school, the Ministry of Education decided that one of the Deputy Head teachers be transferred from the school. The Applicant was the one that was transferred by letter dated 11 May 2011. The Applicant resisted the transfer on the basis that it was in violation of **Regulation 24 of the Teaching Service**

- Regulations of 1983**, because he never requested in writing to be transferred from Mbabane Central High School.
- [6] The 1st Respondent again wrote another letter dated 06 November 2011 re-iterating its instruction that the Applicant should transfer to Lobamba Lomdzala High School on or before Friday 18 November 2011. The Applicant again did not heed the instruction because his letter of objection to the transfer written to the 1st Respondent had not been responded to.
- [7] On 15th December 2011 the Applicant was accordingly charged with misconduct for his failure to report for duty at Lobamba Lomdzala High School. The Applicant was charged with disobedience and insubordination to the 1st Respondent under **Regulation 15(i)(C) and (J) of the Teaching Service Regulations**. The Applicant appeared before the 1st Respondent for a disciplinary hearing. The applicant was found guilty and was suspended without pay for a period of one year.
- [8] The decision and the sanction imposed by the 1st Respondent are not annexed to the Applicant's papers. The 1st Respondent in its Answering Affidavit did not deny that indeed the Applicant was found guilty and suspended for a period of one year without pay. After the lapse of the one

year period, the Applicant was re-instated and transferred to Jericho High School. This was in terms of Annexure “SN4” dated 05 June 2013 which appears as follows:-

“05 June 2013

TSC 14474

DLAMINI SIPHO

Sir,

RE: REINSTATEMENT AND TRANSFER---YOURSELF

Following your suspension by the Teaching Service Commission on the 28th May 2012 for a period of one year which ended on the 28th May 2013. I am directed by the Teaching Service Commission to inform you as I hereby do that you are re-instated into the Teaching Service and transferred to Jericho High School in the Shiselweni region as a Deputy Head Teacher with effect from date of resumption.

Yours faithfully

M.E. NKAMBULE

EXECUTIVE SECRETARY”

[9] The Applicant upon receiving this correspondence instituted an application to this court under a certificate of urgency for an order stopping the transfer. On 18 June 2013 the court granted a *rule nisi* stopping *the* transfer of the Applicant to Jericho High School pending the finalization of the main application.

[10] The Applicant in the present proceedings is therefore seeking an order in the following terms:

“1. *Reviewing and or setting aside the 1st Respondent’s decision contained in a letter dated 28th May 2012 and purporting to suspend the Applicant without pay for a period of one year.*

2. *Costs of application.*

3. *Further and or alternative relief.”*

[11] As already pointed out in paragraph 8 herein, the 1st Respondent's decision that is being sought to be reviewed and or set aside, has not been annexed to the papers before the court.

[12] The reasons for seeking the order for review or setting aside of the decision to suspend the Applicant without pay for a period of one year appear in paragraphs 33 to 41 of the Applicant's Founding Affidavit. In paragraph 34 of the Founding Affidavit the Applicant stated that the 1st Respondent refused and or failed to furnish him with the reasons and that as such, he is not aware of the basis for the adverse decision taken against him. In paragraph 35 the Applicant stated that because of the failure of the 1st Respondent to furnish him with the reasons for the decision, the 1st Respondent breached the provisions of **Section 33(2) of the Constitution of Swaziland and the principles of natural justice.**

[13] **Section 33 of the Constitution of the Kingdom of Swaziland** provides that;

“Right to administrative justice

33 (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the

requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.”

[14] The 1st Respondent denied that it failed to furnish its reasons to the Applicant. It stated in paragraph 34 of its Answering affidavit that;

“I deny the contents of this paragraph. In a letter dated 29 October 2012 the TSC gave reasons for its decision. The Applicant’s legal representative picked up this letter from the TSC’s offices. A copy of the letter is attached hereto marked “TSC1”

The letter referred to is however not attached to the 1st Respondent’s papers.

[15] There is therefore clearly a dispute of fact whether the Applicant was furnished with the reasons for the decision or not.

[16] In paragraph 36 of the Founding Affidavit the Applicant stated that during the proceedings he was refused an opportunity to arrange for and call his witnesses. This is again denied by the 1st Respondent which stated in its paragraph 36 that;

“I deny the contents of this paragraph. The Applicant was given the opportunity to call witnesses to testify for him. The Applicant testified on his own behalf and the end of the evidence, he told the TSC that he would not be calling any one to give evidence in support of his defence.”

[17] Again this shows that there is a dispute of fact in this matter. From paragraph 37 up to paragraph 41 the Applicant made averments which according to him constitute irregularities on the part of the 1st Respondent justifying that the decision be reviewed and or set aside. These are all denied by the 1st Respondent.

[18] It is therefore clear that the court cannot be able to resolve the matter on the papers as they appear because of the serious disputes of fact. The court is aware of the decision in the case of **Plascon - Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** where the court stated at page 625 that:

“In certain instances the denial by Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact”

In the Plascon – Evans Paints case the affidavits revealed certain disputes of fact. The appellant nevertheless sought a final interdict together with ancillary relief, on the papers and without resort to oral evidence. In the present case the court is satisfied that there are genuine disputes of fact which cannot be resolved by the court on the papers as they appear. Oral evidence will have to be led to assist the court to resolve the matter.

[19] The matter is accordingly referred to trial and the court directs that it be enrolled in the Trial Register. The affidavits filed of record will stand as pleadings. The litigants are directed to take all such steps as may be necessary in terms of the rules to bring the matter to trial.

[20] The court accordingly makes the following order:

- 1. The matter is referred to trial in terms of Rule 14 (13 (b) of this court’s Rules.**
- 2. Costs are reserved until the finalization of the matter.**

[21] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR B.S. DLAMINI
(B.S. DLAMINI ATTORNEYS)**

**FOR RESPONDENTS: MR. M. VILAKATI
(ATTORNEY-GENERAL'S CHAMBERS)**